

1 AL SMITHSON, Esq.
2 830 23rd Street
3 San Diego, California 92102

4 (619) 234-8729

5 Attorney State Bar No. 51611

6 Attorney for Material Witness:
7 BENITO MARTINEZ-HERNANDEZ

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
(Honorable Anthony J. Battaglia)

10 UNITED STATES OF AMERICA,) MAGISTRATE CASE 08M2481-AJB
11)) DATE: September 16, 2008
12 Plaintiff,) TIME: 1:30 P.M.
13 v.) COURTROOM A
14 JOSE RAMON HERRERA-CONTRERA) NOTICE OF MOTION
15 JOSE FELIPE PEREZ) AND MOTION FOR ORDER
16 WILMER GIOVANY OLMEDO) SETTING VIDEO DEPOSITION
17) OF MATERIAL WITNESS
18 Defendants.) BENITO MARTINEZ-HERNANDEZ
19)

20 TO: ALL NAMED PARTIES AND THEIR ATTORNEYS and ASSISTANT UNITED
21 STATES ATTORNEY, Attorney for Plaintiff, THE UNITED STATES.

22 PLEASE TAKE NOTICE that on Tuesday, September 16, 2008 at 1:30
23 P.M. in the Courtroom A of the Honorable ANTHONY J. BATTAGLIA, or as
24 soon thereafter as counsel may be heard, the material witness,
25 BENITO MARTINEZ-HERNANDEZ, by and through counsel, AL SMITHSON,
26 will bring the above entitled motion.

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MOTION

The material witness, BENITO MARTINEZ-HERNANDEZ, by and through counsel, AL SMITHSON, and pursuant to Rule 15(a) of the Federal Rules of Criminal Procedure, and pursuant to 18 U.S.C. Section 3144, moves for an order to secure a video deposition of testimony of this material witness pending trial, and for an Order for release from custody immediately thereafter.

This motion will be made on the grounds that this witness is unable to meet any condition of release and that his testimony can be adequately secured by deposition and that detention is not necessary to prevent a failure of justice and that further detention imposes a severe hardship on the witness and his family.

This motion will be based upon the Declaration of Attorney AL SMITHSON, the Memorandum of Points and Authorities in support of this motion, and all documents and records on file herein, and upon such oral testimony as the Court may deem proper.

DATED: September 1, 2008

/s/ Al Smithson
AL SMITHSON, Attorney for
BENITO MARTINEZ-HERNANDEZ

AL SMITHSON, Esq.
830 23rd Street
San Diego, California 92102

(619) 234-8729

Attorney State Bar No. 51611

Attorney for Material Witness:
BENITO MARTINEZ-HERNANDEZ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(Honorable ANTHONY J. BATTAGLIA)

UNITED STATES OF AMERICA,) MAGISTRATE CASE 08MJ2481-AJB
Plaintiff,) DATE: September 16, 2008
v.) TIME: 1:30 P.M.
COURTROOM A
JOSE RAMOS HERRERA-CONTRERA) PROOF OF SERVICE
JOSE FELIPE PEREZ)
WILMER GIOVANY OLMEDO)
Defendants.)

I.

INTRODUCTION

I, the undersigned, state:

That I am over eighteen years of age, a resident of the County of San Diego, State of California, and not a party in the within action;

That my business address is: 830 23rd Street, San Diego,
California 92102;

That I served the NOTICE OF MOTION and MOTION FOR ORDER
SETTING VIDEO DEPOSITION OF MATERIAL WITNESS; DECLARATION OF
ATTORNEY IN SUPPORT OF MOTION FOR ORDER SETTING VIDEO DEPOSITION OF

1 MATERIAL WITNESS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
2 OF MOTION FOR SETTING VIDEOTAPE DEPOSITION OF MATERIAL WITNESS on
3 counsel involved in this matter. These documents have been served
4 on counsel of record and the AUSA via the Court's email
5 notification system.

6 I certify under penalty of perjury that the foregoing is true
7 and correct. Executed on September 1, 2008, at San Diego,
8 California.

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10 /s/ Al Smithson
11 AL SMITHSON, Attorney
For Material Witness
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AL SMITHSON, Esq.
830 23rd Street
San Diego, California 92102

(619) 234-8729

Attorney State Bar No. 51611

Attorney for Material Witness:
BENITO MARTINEZ-HERNANDEZ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(Honorable ANTHONY J. BATTAGLIA)

UNITED STATES OF AMERICA,

) MAGISTRATE CASE 08MJ2481-AJB

) DATE: September 16, 2008
) TIME: 1:30 P.M.

Plaintiff,

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

v.

**OF MOTION FOR ORDER
SETTING VIDEO DEPOSITION**

JOSE RAMON HERRERA-CONTRERA

**OF MATERIAL WITNESS
BENITO MARTINEZ-HERNANDEZ**

JOSE FELIPE PEREZ

BENITO MARTINEZ-HERNANDEZ

Defendant

I.

INTRODUCTION

The material witness, BENITO MARTINEZ-HERNANDEZ arrested on or about August 11, 2008, and has remained in custody since that date.

Material witness BENITO MARTINEZ-HERNANDEZ, seeks an Order by this Court under 18 U.S.C. Section 3144 and Federal Rule of Criminal Procedure 15 to have his testimony preserved in a video deposition as he has been unable to secure a surety under the conditions imposed by the government in this matter.

II.

UNDER EXISTING FEDERAL LAW

THE COURT IS REQUIRED TO ORDER

THE DEPOSITION AND RELEASE OF THIS WITNESS

18 U.S.C. Section 3144 provides that a material witness who is unable to comply with any condition of release has the right to have their deposition taken and thereafter be released:

"No material witness may be detained because of inability to comply with an condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice..."

"Upon such a showing, the district must order [the witness'] deposition and prompt release." (*Torres-Ruiz v. United States District Court for the Southern District Court of California*, 120 F.3d 933, 935 (9th Cir., 1997)) (emphasis in original).

Further, Federal Rule of Criminal Procedure 15 (a) provides the procedure basis for this motion for deposition:

"If a witness is detained pursuant to Section 3144 of Title 18, United States Code, the Court on written motion of the witness and upon notice to the parties may direct that the witness's deposition be taken. After the deposition has been subscribed the Court may discharge the witness..."

Under such circumstances, "if the deposition would prove admissible over any objection under the Confrontation Clause of the United States Constitution or the Federal Rules of Evidence, the

1 material [witness] must be deposed rather than detained." (Aguilar-
2 Ayala v. Ruiz, 973 F.2d 411, 413 (5th Cir. 1992)).

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4 The language of 18 U.S.C. Section 3144 is mandatory and
5 requires material witness's deposition and release.

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7 Further, legislative history supports the position that the
8 deposition and release of a material witness is mandatory.

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10 Section 3144: RELEASE OR DETENTION OF A MATERIAL WITNESS,
11 reads (in part):

12 This Section carries forward, with two significant changes,
13 current 18 U.S.C. 3149 which concerns the release of a material
14 witness. If a person's testimony is that it may become
15 impracticable to secure his presence by subpoena, the government is
16 authorized to take such person into custody. A judicial officer is
17 to treat such a person in accordance with Section 3142 and to
18 impose those conditions of release that he finds to be reasonably
19 necessary to assure the presence of the witness as required, or if
20 no conditions of release will assure the appearance of the witness,
21 order his detention as provided in Section 3142. However, if a
22 material witness cannot comply with release conditions or there are
23 no release conditions that will assure his appearance, but he will
24 give a deposition that will adequately preserve his testimony, the
25 judicial officer is required to order the witness's release after
26 the taking of the deposition if this will not result in a failure
27 of justice... 1984 U.S. Code Cong. and Adm. News, p. 3182.

1 In the instant case, in which the material witness will have
2 been incarcerated 36 days on the hearing date of this motion due
3 solely to his inability to secure bond, continued incarceration
4 violates the clearly stated intent of the Congress and the
5 straightforward rulings by the Court of Appeals (*Torres-Ruiz v.*
6 *United States District Court*) that such practices shall not be
7 permitted. Prolonged and continued incarceration clearly meets the
8 test of "exceptional circumstances" as referenced in *Torres-Ruiz v.*
9 *United States District Court*. In another case where the material
10 witness had been in custody for three weeks, the Fourth Circuit
11 held that continued incarceration with no prospective surety
12 available to post bond was an exceptional circumstance justifying
13 deposition and release of the material witness. (*United States v.*
14 *Rivera*, 859 F.2d, 1204, 1205 (4th Cir. 1988))

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16 The circumstances in this case are similar to *Torres-Ruiz* and
17 *Rivera*, as the material witness in this case continues to be held
18 for no purpose other than to be a witness owing solely to his
19 inability to post bond. Because deposition serves as an adequate
20 alternative to his continued incarceration, BENITO MARTINEZ-
21 HERNANDEZ has "an overriding liberty interest in not being detained
22 as a material witness when the deposition serves as an adequate
23 alternative to prolonged detention." (*Aguilar-Ayala v. Ruiz*, 973
24 F.2d 411, 419-420 (5th Cir. 1992)). Under the standards articulated
25 by the Court of Appeals, prolonged incarceration of BENITO
26 MARTINEZ-HERNANDEZ merely because of his inability to secure bond
27 thus is an exceptional circumstance that mandates his immediate
28

1 deposition and release.

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3 Exceptional circumstances also may be shown by the effect of
4 prolonged incarceration on the family of the material witness.
5 (Torres-Ruiz v. United States District for the Southern District of
6 California) In the Torres-Ruiz case, the material witnesses were
7 held more than 60 days and the Ninth Circuit held "the continued
8 detention of . . . material witnesses, whose testimony could be
9 adequately preserved by videotaped deposition and whose families
10 are suffering extreme hardship as a result of petitioner's
11 continued detention, is an exceptional circumstance justifying the
12 extraordinary remedy of mandamus. . ." and ordered the district
13 court to "schedule video depositions of petitioners at the earliest
14 possible date."

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16 In the instant matter, counsel acting on behalf of the
17 detained material witness believes there will be no failure of
18 justice in requiring a deposition, and asserts that such is
19 supported by case law. It is true that the defendants have a
20 Constitutional right to confront and cross-examine witnesses
21 against them, but these rights must be balanced against the
22 Constitutional rights of the detained witness. In this matter, the
23 defendants are represented by counsel who has been notified of the
24 deposition and invited to ask all questions of the witness which
25 counsel believes will further their case.

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III.

CONCLUSION

Under the clear meaning of 18 U.S.C. Section 3144, legislative history and relevant case law, the ordering of a deposition and subsequent release of this material witness is mandatory. With that in mind, the witness respectfully requests this Court grant a video deposition of his testimony and then order his release.

DATED: September 1, 2008

/s/ Al Smithson
AL SMITHSON, Attorney for
Material Witness
BENITO MARTINEZ-HERNANDEZ

AL SMITHSON, Esq.
830 23rd Street
San Diego, California 92102

(619) 234-8729

Attorney State Bar No. 51611

Attorney for Material Witness:
BENITO MARTINEZ-HERNANDEZ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(Honorable ANTHONY J. BATTAGLIA)

UNITED STATES OF AMERICA,

) MAGISTRATE CASE 08MJ2481-AJB

) DATE: September 16, 2008

) TIME: 1:30 P.M.

) COURTROOM A

v

) DECLARATION OF ATTORNEY
)
AL SMITHSON IN SUPPORT
)
OF MOTION FOR ORDER
)
SETTING VIDEO DEPOSITION
)
OF MATERIAL WITNESS

JOSE RAMON HERRERA-CONTRERA
JOSE FELIPE PEREZ
WILMER GIOVANY OLMEDO

BENITO MARTINEZ-HERNANDEZ

Defendants.

T

INTRODUCTION

I, AL SMITHSON, declare that I am an attorney, duly licensed to practice law in the State of California and in the United States District Court for the Southern District of California;

I am making this declaration on behalf of the material witness, BENITO MARTINEZ-HERNANDEZ was arrested on or about August

1 11, 2008, and has remained in custody since that date. The material
2 witness has no friends, neighbors, or acquaintances in the United
3 States who can qualify as an acceptable surety to accommodate his
4 release from custody.

5 Material witness BENITO MARTINEZ-HERNANDEZ came to the United
6 States to seek employment to help support his family.

7 The material witness will have been in custody for 36 days as
8 of the hearing date of this motion. To continue to remain in
9 custody imposes an extreme hardship on the material witness and on
10 his family.

11 In view of these facts, material witness BENITO MARTINEZ-
12 HERNANDEZ seeks an Order for a video deposition from this Court. I
13 have fully explained the procedures involved in this deposition
14 process and received his promise of full cooperation in the video
15 deposition process.

16 I am unaware of any reason why this witness should not be
17 released from custody in this case after the video deposition
18 pursuant to Rule 15 (a) of the Federal Rules of Criminal Procedure,
19 and am further unaware of the existence of a statement of such
20 reason by any other attorney on this case.

21 I believe it would be in the interests of justice to allow the
22 testimony of this material witness in question to be secured by
23 video deposition and to thereafter release the material witness
24 to prevent them from suffering custody any longer than necessary in
25 order to further justice in this case.

26 I declare under penalty of perjury that the foregoing is true
27 and correct.

1 **DATED: September 1, 2008.**

2 /s/ Al Smithson

3 **AL SMITHSON, Attorney for Material Witness**
BENITO MARTINEZ-HERNANDEZ

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